Determination of native title — *De Rose*

De Rose v South Australia [2002] FCA 1342

O'Loughlin J, 1 November 2002

Issue

The question in this case was: Did native title exist in relation to the area claimed? The question was answered in the negative. While the claimants did prove that they retained knowledge of their traditional laws and customs, Justice O'Loughlin found that there was insufficient evidence given to prove that the claimants were currently acknowledging (or, as it was put, adhering to) those laws and observing those customs in the manner required under the NTA. This decision is subject to appeal.

His Honour was at pains to point out a 'most important qualification' in relation to the litigation, which was that the court must make a decision based upon what is put before it:

> That is, and always will be, a weakness in the adversarial system: a decision has to be made on the evidence that counsel places before the Court without the Court knowing whether it is the totality of the evidence that is available on the subject—at [144].

Some of the findings noted below need to be read in the light of the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, summarised in *Native Title Hot Spots* Issue 3. For example, the finding that native title was abandoned should be read in the light of the comments in the joint judgment at [90] to [91].

Background

This case concerns an application for a determination of native title that was made over three pastoral leases in the far north-west of South Australia that are collectively known as De Rose Hill Station (De Rose Hill). The group making the claim did so as *Ngura*ritja i.e. traditional owners of the claim area. The court accepted that the claim area was within Yankunytjara country. Some of the claimants were born on the station and many had previously worked or lived on the station. The last of those who worked on the station left in 1978. It should be noted that the claimants' traditional country extended beyond the station boundary.

The evidence of the claimants

Twenty-six Aboriginal people gave evidence in support of the application. O'Loughlin J provides an extensive summary of the evidence in his reasons for decision. Only two of the 23 witnesses were in what his Honour described as the younger generation, which led to the comment that:

> It was...very disappointing and somewhat significant not to have received evidence from more young people. One is left wondering whether the members of the younger generations have the same interest in native title elements as their elders—at [17].

One of the people who originally brought the application, identified as *Nguraritja* in the anthropological reports, did not give evidence. No reason was given as to why this was so. This led O'Loughlin J to draw an inference that, if the person in question had given evidence, it 'would not have assisted the claimants' case—at [11], with reference to *Jones v Dunkel* (1959) 101 CLR 298.

His Honour was also concerned that, when asked what they would do if they were successful in obtaining a determination of native title, none of these witnesses gave:

> [D]etailed evidence that amounted to statements of intention to resume the observance of traditional customs or the maintenance and acknowledgement of traditional laws—at [39].

Expert evidence

In addition to the Aboriginal witnesses, a linguist, an archaeologist, a historian, a former missionary and three anthropologists all gave evidence in support of the claim. A fourth anthropologist, who was to take a leading role, was unable to give evidence due to illness. However, genealogies she prepared were used in the case. The only witness called by the state was an anthropologist. O'Loughlin J emphasised that:

> The evidence of the claimants and their Aboriginal witnesses will provide the most compelling evidence in any native title case. Even the evidence of [an anthropologist who is] a fully-initiated Western Desert man [and] also an eminently qualified anthropologist, could not be more important than the claimants' evidence when it comes to establishing whether the claimants are entitled to a determination of native title over the claim area—at [351].

His Honour later noted that his conclusion in relation to the manner in which connection was established was 'no more than an inference that is based more on the evidence of *Anangu* [a word meaning 'person' or 'people' that the Pitjantjatjara and Yankunytjatjara people use to refer to themselves and other Aboriginal people] witnesses than it is on the opinions of the experts'—at [373].

O'Loughlin J referred favourably to the evidence of one of the anthropologists, commenting that he walked the path between being an initiated man and a neutral expert witness with 'considerable skill' and that he provided detail and explanations of traditional laws and customs relevant in establishing the laws and customs of the Western Desert region—at [337] and [344].

However, his Honour was of the view that:

> [W]hat was needed from the claimants was evidence that applied [the expert witness's] evidence to the claim area. That [evidence] was not forthcoming...
>
> [The expert witness] was not able to give evidence that the claimants acknowledged and observed traditional laws and customs. That is not a satisfactory basis from which to impute a level of knowledge to the claimants that is equivalent to that displayed by [the expert witness]. It would ... be drawing a long bow to suggest that statements made by [the expert witness], who has never been on the claim land and has no significant

> personal knowledge of the claimants themselves, could be used to establish or support a level of observance and acknowledgement of traditional laws and customs by the claimants. That was, essentially, for the claimants themselves to establish on the basis of their evidence—at [342] to [343].

In respect of another of the anthropological experts, his Honour took the view that he was:

> [T]oo close to the claimants and their cause; he failed to exhibit the objectivity and neutrality that is required of an expert who is giving evidence before the court. Rather, he seemed — too often — to be an advocate for the applicants—at [352].

This led the judge to conclude that he could not safely rely on this witness's evidence where it was controversial, challenged or uncorroborated by clear evidence from another reliable source. His Honour was also critical that the anthropologist relied on interview rather than observation to ascertain the laws and customs of the people i.e. many of his opinions were drawn from interviews—at [374].

The linguist's evidence was not, according to the court, supported by the weight of the claimants' evidence. O'Loughlin J found that the Antikirinya and Yankunytjatjara are separate (though closely related) peoples. The evidence was referred to in relation to the state's contention that the Antikirinya had, at some early stage, been displaced from or otherwise left their traditional lands and had been replaced by new arrivals from the west. This contention arose, in part, from the maps of the early ethnographers, which showed the Yankunytjatjara and Antikirinya as separate languages and territories—at [306] to [313].

The evidence of the archaeologist, 'an articulate and impressive witness', that the claim area had been occupied by Aboriginal people prior to the acquisition of the land by the Crown was accepted. However, it did not identify who the Aboriginal occupants of the land were at the time of sovereignty: 'Whether they were Yankunytjatjara, Pitjantjatjara, Antikirinya or some other group, cannot be ascertained by reference to his evidence — nor, indeed, by reference to any evidence in the trial'—at [315].

The evidence of the historian was accepted. However, his Honour was of the view that some of it was of little assistance to the court:

> I cannot make a finding in favour of the claimants based solely on [historical] evidence of the wider region, or because, by comparison to "their southern brethren", the north-west Aboriginal people [where De Rose Hill is situated] retained greater access to their land and greater observances of their traditional laws and customs. There must be specific evidence relating to the claimants, to those who preceded them and to the claim area... .
>
> [T]he degree to which the requisite connection to the land has been retained (if at all) cannot be ascertained by reference to the evidence of [the historian]. It will be necessary to have regard to other sources of evidence, most notably the evidence of the claimants themselves—at [319] and [321].

Attitude of the pastoralists

Evidence for the respondents was given by the man who established De Rose Hill Station, his son (who now manages the station) and a former police officer and pastoral board inspector. In terms of their treatment of Aboriginal people, O'Loughlin J had 'no difficulty' in accepting that both father and son:

> [L]ack appreciation of Aboriginal culture. They showed no interest in the practices and beliefs of the Aboriginal people and, as a result, the Aboriginal people had no inclination to volunteer any information to them. That was why [they] had no knowledge of any place of special interest to Aboriginal people—at [464].

Overall, on many points, his Honour preferred the evidence of the Aboriginal claimants to that of the pastoralists:

> I do not accept that [the father] adopted an attitude of benevolence towards all Aboriginal people in general. I believe his attitude was to drive away those who were not workers or members of the immediate family of workers. [The father] did not appreciate that he had an aggressive bullying demeanour—at [436].

In particular, it was found that the father did not hesitate to intimidate Aboriginal people or to destroy their property by the use of firearms and that such conduct was 'high-handed in the extreme':

> The evidence...established that, by and large, the Aboriginal people and [the pastoralist] got on well initially but that, unfortunately, their relationship became strained and the claimants developed an apprehension that the [father and son] had an attitude of hostility towards them—at [436] and [448].

Later in his reasons, O'Loughlin J returned to this issue:

> The evidence showed [the father]...was mostly well disposed towards his Aboriginal workers and their families, but ...would not hesitate to physically assault people ... . He would not tolerate Aboriginal people who wished to visit friends and relatives ... living on the station... . [O]nly those who worked for him and their families were, in his assessment ... , entitled to be on "his property"... . [H]e would not hesitate to resort to the occasional use of firearms to make his point ... . Even allowing for his shooting of the [Aboriginal people's] dogs, his conduct was not such as to justify a claim from the resident Aboriginal people that he was the cause of them having to leave their land. His son was possessed of a somewhat dour and unfriendly personality [and] like his father, neither understood nor cared about Aboriginal custom and culture. However, those weaknesses in his character and attitude cannot be converted into justifiable causes for the Aboriginal people leaving the claim area—at [895].

Reasons for leaving

Many of the witnesses for the claim group said that they had not returned to De Rose Hill since leaving because they were afraid to do so. However, despite his findings in relation to the lessee's attitude, O'Loughlin J held that, while the conduct of the father was one of the factors leading to the claimants leaving the station, any perception that the claimants had as to the hostility of the pastoralists to their presence on the land was not sufficient to show that they were forced into staying away from the property:

> If the Aboriginal people left De Rose Hill Station for an unreasonable or illogical reason (even though subjectively they may have thought their departure was necessary) they cannot now turn their lack of reasonableness and lack of logic to their advantage. Sadly,

> there are, in our Colonial history, numerous accounts of Aborigines having been driven off their land against their will. One can easily imagine, in such circumstances, how an Aboriginal person would retain a yearning for his or her country; and that yearning could easily translate into a retention of a spiritual connection with the country. But, as will become apparent when I discuss the evidence of the Aboriginal witnesses, there was no suggestion that the conduct of the [pastoralists] was so extreme that it forced the Aboriginal people to leave De Rose Hill Station against their will—at [291]. See also [893].

The evidence of many of the witnesses was that a number of gates on the station had been locked, thus impeding access to their country and creating the impression that De Rose Hill was 'locked country'. It was submitted that the locked gates, along with the strained relationship and hostility of the pastoralists, made it difficult for the claimants to access the land and be present on it—at [490].

O'Loughlin J held that some gates were first locked somewhere between 1991 and 1994 but noted that not all the gates were locked. This led to a conclusion that:

- the fact that gates were locked could only have served as some form of deterrent to entry to the station since the early 1990s;
- those witnesses who left De Rose Hill prior to the early 1990s could not use locked gates as their reason for not returning to care for the country;
- in any case, the claimants could have, if they wished to, entered De Rose Hill to follow their traditional pursuits e.g. pursuant to rights available to them under the reservation in favour of Aboriginal people to which the leases were subject—at [491].

In relation to submissions that the claimants left the station as a result of various other factors, including natural disasters and the establishment of missions and other settlements, his Honour made the following comments:

> [I]t must be recognised that natural calamities such as droughts, floods and sickness may well be matters that militate against the Aboriginal claimants. Far from evoking an attitude of sympathy and leniency to an application, they may constitute the very reason for explaining why the Aboriginal people have left a particular area and, in so doing, have broken their connection with that land. This is and will continue to be an ongoing problem in the pursuit of native title. Aboriginal claimants must be ready to maintain and assert their rights and interests in relation to land and waters where those "rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by" the Aboriginal people. Thus it is that many native title claimants will have to overcome such matters as the introduction of livestock, the availability of rations, the establishment of Missions and the other matters to which reference has been made. Neither the common law nor the provisions of the NTA constitute a bulwark against the presence of these European influences. Any of them may, in a given case, have such an effect as to break the necessary connection with the claim area—at [888].

O'Loughlin J was of the view that the two main reasons why Aboriginal people left De Rose Hill, both of which 'deny the presence of a continuing connection with the claim area' were:

- the opening of a community centre in 1968: 'It was like a magnet, offering easy accessibility to food and water coupled with the community facilities that were

available'. Later, the community also became the location for pension payments; and

- opportunities for work began to dry up for various reasons, including that, from 1968, pastoral lessees were required to pay award rate wages to Aboriginal employees—at [896].

His Honour's conclusion was that:

> Of the two factors, the factor of greatest significance was the loss of work. That resulted in the Aboriginal people leaving De Rose Hill; they did not attempt to stay in the area and maintain a physical or spiritual connection with the land in accordance with the traditional laws acknowledged and the traditional customs observed. In a lifestyle that was more in line with European practice, the loss of employment in one location led to a re-location in another place, preferably in the hope of obtaining paid work. The movement of the Aboriginal people away from De Rose Hill Station was not associated with their Aboriginal lifestyle, traditions or customs; it was governed by aspects of European social and work practices—at [896].

Care of sites of significance

Two of the primary witnesses for the claimants gave evidence that they did not attend to certain ceremonies in relation to significant sites while working on the station because they feared that they would be sacked if they did—at [104].

O'Loughlin J rejected this evidence:

> The strength of Aboriginal culture is well-known; the attachment to land intense; the importance that is attached to secret and sacred places is exceptionally strong. If [those who were] *Nguraritja* for De Rose Hill were intent on performing their duties... they would have entered upon the land — even surreptitiously if necessary — to perform their duties. Save for some occasional hunting trips, not one witness for the claimants has attended to any religious, cultural or traditional ceremony or duty on De Rose Hill Station in almost twenty years—at [106].

His Honour was of the view that the claimants could have undertaken these duties outside of working hours. Further, their failure to attend to these things could not be characterised as an evolution of the traditional law and custom under the pressure of changing circumstances because the evidence was that caring for sites of significance is still an important responsibility—at [107].

Knowledge of law and custom

The court took evidence on 13 sites, eight of which are within the station boundary. His Honour was satisfied that the claimants had demonstrated their knowledge of both the particular sites and the activities which are engaged in at those sites:

> [T]he evidence on these subjects was sufficient to establish that those witnesses still retain a knowledge of those activities, many of which are site specific. Nevertheless, the question still remains: can it be said that the claimants' knowledge of those activities means that the claimants have retained a connection to the claim area?—at [381].

O'Loughlin J was particularly concerned 'that there has been a *virtual absence of all Aboriginal people from the claim area for twenty years or so*'—at [382], emphasis added.

***Nguraritja* as native title holders**

The evidence established that there were a number of methods by which a person may become *Nguraritja*:

- being born on the claim area;
- having a long-term physical association with the claim area;
- having ancestors who were born on the claim area; or
- having geographical and religious knowledge of the claim area; and
- being recognised as *Nguraritja* for the claim area by the other *Nguraritja*—at [562].

However, O'Loughlin J held that a finding that a person is *Nguraritja* for the claim area will not necessarily lead to that person satisfying s. 223(1) of the NTA. That subsection provides that:

> The expression native title or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples...in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples ... ; and
>
> (b) the Aboriginal peoples ... , by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

His Honour commented that:

> Some of the claimants may well be *Nguraritja*...and may thereby satisfy the requirements of par 223(1)(a) of the Act. However, par 223(1)(b) requires that, by those laws and customs acknowledged and observed, those claimants must have a connection with the claim area... . Given that native title can give rise to significant rights and interests in land, there should be ... more than a mere trifling connection to the claim area for an individual, group or community to be entitled to a determination of native title in his, her or their favour—at [561].

As he was of the view that some of the claimants 'had a much stronger claim to a connection to the claim area than others', O'Loughlin J thought he must 'assess the degree of connection to the claim area of each witness who has been put forward as *Nguraritja*'. This inquiry was said to be necessary in order to establish 'whether that person or those persons have the requisite connection that the NTA requires'. Only then did his Honour feel he would be in a position to assess the connection of the claimants as a whole—at [563].

Connection

His Honour found that, while there is no requirement that the claimants prove a biological connection between the Aboriginal people who occupied the claim area prior to the assertion of sovereignty and the present claimants, some continuity, (whether through migration, marriage or even tribal dispute) must be shown. In this case, it was sufficient that the claimants had established a form of connection with those in occupation when sovereignty was asserted by a process of incorporation

that reflected the pattern of migratory movements of the Western Desert people—at [372]. See also [345] and [346].

While accepting that the claimants must show 'substantial maintenance' of their connection from sovereignty to the present day in order to be entitled to a determination recognising the existence of their native title, O'Loughlin J was of the view that:

> [I]f I were to be satisfied that the claimants currently have a connection with the claim area through traditional laws and customs observed and acknowledged, and the best evidence available provides some support for the presence of that connection in the past ... it might be open to me to make a finding of substantial maintenance of continuity of connection from sovereignty to the date of the application for a determination of native title ... notwithstanding significant gaps in the chronology in the historical timeline for the claim area. To place any higher burden of proof on the claimants, who have a wholly oral tradition that reaches back reliably no further than three or ... four generations, would be manifestly oppressive—at [570].

Onus of proof

His Honour noted that:

- the ultimate burden of proof rests on the claimants: *Coe v Commonwealth* (1993) 118 ALR 193; [1993] HCA 42 per Mason CJ at 206;
- although there may be an evidentiary burden on those alleging extinguishment because of abandonment to raise the issue, it is not for the respondents to prove that extinguishment has occurred - the claimants must establish that extinguishment has not occurred;
- the claimants must show that native title rights and interests currently exist and they will fail to do so if the rights and interests that they once possessed have been abandoned—at [913].

No connection or abandonment of connection

His Honour set out the evidence of the Aboriginal witnesses and, in the light of the matters discussed below, found that either they could not establish a connection with the claim area or that they had abandoned that connection—at [572] to [887].

O'Loughlin J was satisfied that:

- there was a time when Aboriginal people had exclusive possession in respect of the claim area;
- the traditional owners of the claim area were those who were recognised and accepted by others as *Ngururaritja*;
- ceremonies performed by the claimants show that the Aboriginal witnesses still retain knowledge of their traditional laws and customs;
- the evidence led showed the dreamings were not forgotten, but the claimants did not otherwise establish as a matter of probability that a particular individual still maintained a spiritual connection with the area—at [904] and [906].

His Honour went on:

> The claimants have submitted that the Aboriginal people, who are properly described as *Ngururaritja* in respect of the claim area, still maintain a spiritual and physical connection

> with the land. I have concluded that there is not now, and there has not been, any such physical connection to the claim area for the last twenty years or so. I realise that an ongoing physical connection is not necessary; a spiritual connection ... can still be used to identify a retention of native title. I accept that many of the witnesses ... have claimed that they have retained some affinity with the land. However, their actions belie their words. The occasional hunt for kangaroos, whilst no doubt traditional, stands out in isolation. No other physical or spiritual activity has taken place in the last twenty or so years. The *Ngguraritja* are presently individual people who, if they did once form part of a community or a group, no longer do so. There is not now and there has not been for many, many years, an *Anangu* community or a group of *Anangu* who could properly be described as having, as a community, or as a group, a physical or a spiritual connection with the claim area. In my opinion, it is appropriate to conclude that there is a lack of connection between the claimants and the claim area; the claimants have lost their physical and spiritual connection and, because of that loss, there has been a breakdown in the acknowledgment of the traditional laws and in the observance of the traditional customs; that breakdown is fatal to their claim—at [911].

Factors going to finding of abandonment

O'Loughlin J cited the following as factors as being relevant to his conclusion that the requisite connection did not exist in this case:

- the last of the claimants physically left De Rose Hill in 1978;
- the physical activities that would have been tangible evidence of a spiritual connection to the claim area occurred long ago;
- the participants in those activities are now either dead or are limited to the older witnesses;
- none of those who identified as *Ngguraritja* for the claim area has, since that time, lived together or joined together as a cohesive community or group;
- most of the claimants, having left De Rose Hill (for whatever reason) have made no attempt, until the native title field trips, to return to the claim area;
- in the last twenty years or so, no claimant has attended to, or cared for, any sacred site on the claim area and no ceremony of any nature has been organised or performed on the claim area;
- there was insufficient evidence that any of the claimants had combined their work duties on De Rose Hill with their responsibilities as *Ngguraritja* for the land and waters;
- many of the Aboriginal witnesses chose to work on the various stations in the northwest area of the state so that they could earn money and obtain rations rather than caring for the land in the traditional ways of the *Ngguraritja*;
- there was inadequate evidence from members of the present generation about their connection with the claim area;
- many of the Aboriginal witnesses referred to the fact that they had children, yet only two members of the younger generation came forward to assert a claim that they were entitled to a determination of native title in their favour over De Rose Hill—at [905], [910] and [911].

In relation to the claim to being locked out, O'Loughlin J found that, even if he had been satisfied that this was the case (and he was not — see above), the claimants failed to put forward any substantial evidence that ceremonial activities referred to

in the proceedings have been performed in the last twenty years on parts of their country that are outside of the station's boundary and where access is not an issue. This led his Honour to conclude that 'the adherence to (as distinct from knowledge of) traditional laws and traditional customs has eroded away'—at [907].

Decision

O'Loughlin J found that the claimants had failed to prove that they have retained a connection to the claim area by traditional laws and customs acknowledged and observed by them sufficient to satisfy s. 223(1)(b) of the NTA. Therefore, it was found that native title has ceased to exist because those who have asserted title have not established the present subsistence of the necessary connection s. 223(1)(b). Therefore, the application for a determination of native title was dismissed—at [914] and [915].

His Honour did note that his findings did not mean that the Aboriginal witnesses have lost their culture:

> [F]ar from it. Time and again, events occurred which made it plain that there were subjects that had particular significance to them. An obvious example was their respect for the memory of a person who has recently died and the use of the title "Kunmanara" for another person of the same name. Cissie Riley still follows the old lifestyle -- sleeping under the stars in preference to a house and sitting on the ground rather than in a chair. Angkaliya said that she still prepares bush tucker. Tanya Singer- Ducasse is making determined efforts to learn about bush tucker, bush medicine and the songs and dances that are for the women. The Aboriginal men, on several occasions, sang secret and sacred songs at locations some of which I have named and which can readily be identified by anyone who has access to the restricted transcript of the trial. Two very remarkable ceremonies were performed... . The first of those might have had general application in Aboriginal culture but the second, because of the topography, was explicitly site specific. These examples are only a few of the many examples that could be listed to show that the Aboriginal witnesses still retain knowledge of their traditional laws and customs—at [903], emphasis added.

Yet, according to O'Loughlin J, this evidence was not sufficient to show the continuance of traditional laws and customs—at [903].

Right to protect cultural knowledge

One of the rights and interests listed in the proposed determination of native title was:

> The right to prevent the disclosure otherwise than in accordance with traditional laws and customs of tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters.

His Honour commented that, despite the reference to traditional laws, beliefs and practices which relate to land or waters in the proposed determination area, this was no different from the right to protect cultural knowledge which was rejected as a native title right or interest in the joint judgment in *Western Australia v Ward* [2002] HCA 28 (*Ward*, summarised in *Native Title Hot Spots* Issue 1). According to

O'Loughlin J, this right was a 'matter of spiritual beliefs and practices [which] are not rights in relation to land and do not give the connection to land that is required by s. 223 of the NTA'—at [51].

Effect of the grant of a pastoral lease in South Australia

As the pastoral leases under consideration were granted before the *Racial Discrimination Act 1975* (Cwlth), no question of invalidity due to the existence of native title arose and so there was no question of the past act provisions of the NTA applying. In coming to this conclusion, his Honour rejected the lessee's submission that the application of the transitional provisions in the *Pastoral Land Management and Conservation Act 1989* (SA) (the new Act), pursuant to which a pastoral lease granted under earlier legislation was converted to a lease under the new Act, gave rise to a new statutory lease which was a category A past act—at [245] to [246].

As O'Loughlin J was of the view that the grant of the pastoral leases under the South Australian legislation did not give the lessee a right of exclusive possession, each of the leases was said to be a non-exclusive pastoral lease as defined under the NTA—at [5] and [534].

According to his Honour, it followed from the findings in the joint judgment delivered in *Ward* that the grant of such a lease was inconsistent with:

- the native title right of possession, occupation, use and enjoyment of land to the exclusion of all others; and
- any native title right to control the access to and use of land, subject to an exception in relation to other Aboriginal people, which is discussed below—at [534] and [541].

Other native title rights and interests would survive the grant, including the right of access the area and the right to forage and hunt 'to name a few'—at [534].

Control of access by other Aboriginal people

His Honour was of the view that the grant of the lease did not extinguish 'residual rights of control of access and use as between the holders of native title and any other Aboriginal people who seek access to, or use of, the claim area in accordance with the traditional law and customs'. However, O'Loughlin J went on to say that:

> [T]he native title holders could not exercise any control over any person who was present on the claim area as a lawful invitee or licensee of the lessee; no question of competing decisions will arise. If the lessee were to refuse entry to an Aboriginal person who had been invited onto the claim area by the native title holders, the decision of the lessee would prevail—at [558]. [With respect, this renders the proposed native title right somewhat nugatory.]

Operational inconsistency

His Honour, in considering what would have been an appropriate determination had the requisite connection been proved to exist, made some comments in relation to the notion of 'operational inconsistency' and expressed the view that, over areas

where the homestead, sheds, outbuildings and airstrips had been built or created (including a buffer zone), native title was extinguished—at [542] to [558].

In surveying the relevant case law, O'Loughlin J noted that: 'The judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward* indicates that their Honours have not discarded the theory of operational inconsistency'—at [554].

While this is correct, with respect, it was said in the joint judgment that the term 'operational inconsistency' was useful only by way of analogy and that 'the analogy cannot be carried too far'. The notion of 'operational inconsistency' may be useful in determining the extent of the rights of a third party grantee, such as a pastoral lease holder, for the purposes of the application of the inconsistency-of-incidents test. However, their Honours went on to reject 'in principle' the notion that the 'operational inconsistency' analogy applied so that native title rights and interests are extinguished over areas where improvements are made: see *Ward*—at [149] to [151] and [394]. It is noted that this was in the context of the 'project approach' taken by the majority of the Full Bench of the Federal Court in relation to the Ord River irrigation project. However, there seems to be no reason why it should not apply equally to pastoral leases.

Further, in *Ward*, their Honours noted that: 'the erection by a pastoral leaseholder of some shed or other structure on the land may prevent native title holders gathering certain foods in that place'—at [308], emphasis added. However, the judges did not say that this was a means by which native title would be extinguished as a result of an inconsistency with the lessee's rights. Rather, the tenor of this quote is that of regulation of native title rights that are consistent with the rights of the lessee.

His Honour does not appear to have considered the possible effect of s. 24GC and s. 44H on the notion of operational inconsistency. Both sections were inserted into the NTA by the 1998 amendments which, amongst other things, dealt with the implications of the High Court's decision in *Wik* that the grant of a pastoral lease did not necessarily extinguish all native title rights and interests: see *Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40. For this reason, they would appear relevant in this context.

Further, as the making of an application for a determination of native title directly engages the determination provisions of the NTA, 'the statute lies at the core of this litigation' and: '[I]t is to the terms of the NTA that primary regard must be had. The only present relevance of those decisions is for whatever light they cast on the NTA': see *Ward* at [2] and [25].

Section 44H provides (among other things) that, in order to remove any doubts about the effect of doing activities permitted or required to be done under a valid pastoral lease, where the activity is done lawfully in accordance with the terms and conditions of a valid lease, both the requirement and permission to do the activity and the doing of it prevail over native title rights and interests but do not extinguish them. Similarly, s. 24GC NTA deals with (amongst other things) the doing of

primary production activities on or after the date of the Wik decision over areas subject to valid nonexclusive pastoral leases granted on or before that decision. It provides that the doing of the activity prevails over any native title rights and interests but does not extinguish them. For example, pursuant to these sections the holder of a valid pastoral lease that permits or requires the building of a shed can build a shed. If either s. 44H or s. 23CG apply, then building of the shed does not extinguish native title.

Consideration of alternative determination

O'Loughlin J gave consideration to what would be an appropriate determination should his finding that the claimants had not maintained their connection be overturned on appeal. His Honour rejected as 'inappropriate' the claimants' submission that the determination should be that they had a right to the 'nonexclusive possession, occupation, use and enjoyment of the land and waters' of the claim area. He went on to say that, if the claimants were entitled to a determination of native title, then such a determination would recognise rights to:

- access to the claim area;
- move around the claim area;
- hunt, prepare and consume game for food;
- gather and use plants for food and for bush medicine, gather wild tobacco and collect resin for the manufacture of implements and weapons;
- access and use water found in soakages, rock holes, waterholes and springs (but not in man-made waters);
- gather and use timber, stone and ochre. 'Timber could be used for shelter, fuel and the manufacture of weapons; it could also be used in the manufacture of implements such as digging sticks, coolamons and other vessels and for ritual and artistic purposes. Stone could be used for implements, for tools, for weapons and for ritual and artistic purposes';
- hold meetings, to conduct religious activities and ceremonies on the land and to participate and to invite others to participate in those activities and ceremonies— at [920]. See also [922] for a draft determination based on these comments.

It was noted that, in accordance with the NTA and the complementary state legislation, the doing of any activity in giving effect to the rights and interests granted to the pastoral leaseholder would prevail over the native title rights listed above.

Appeal filed

The claimants filed a notice of appeal on 20 November 2002. Some of the grounds of appeal are that O'Loughlin J made an error in finding that:

- the claimants were not *Ngururitja* for the claim area, or had no connection with the claim area or had abandoned any such connection;
- paragraph 223(1)(b) of the NTA requires that the claimants have a physical connection with the land at the date of the determination;
- none of the claimants had a continuing physical connection with the claim area.

Other grounds include that the trial judge erred in not finding that:

- a subjective belief could provide a reason for leaving the land and not returning to conduct ceremonies;
- the claimants had a connection with the land by their traditional laws and customs in circumstances where it was manifestly established that the claimants retained their traditional laws and customs and that they had, by those laws and customs, a spiritual connection with the land.

Other grounds allege that O'Loughlin J's findings that the claimants had no spiritual connection to the claim area and that the claimants had abandoned their connection with the land were against the weight of the evidence.